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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1959

No. 457

NATHANIEL CASTIEL,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the
State of California.

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Nathaniel Castiel respectfully petitions by his counsel Harry P. Glassman, for a writ of certiorari to review a final decision of the Supreme Court of the State of California rendered June 9, 1959, which denied a hearing, following the denial of a petition for a writ of mandate by the District Court of Appeal of

the State of California, in and for the First Appellate District, Division Two, which decision was rendered May 14, 1959.

I.

OPINIONS BELOW.

The appendix does not contain opinions of the District Court of Appeal of the State of California, and the Supreme Court of the State of California in the instant case as the decision of the District Court of Appeal denying petitioner's petition for a writ of mandate and the decision by the Supreme Court of the State of California in denying a hearing were made without opinion.

There are appended to this petition copies of the decisions in *People v. Castiel,* 153 Cal. App. 2d 653 and *Castiel v. Superior Court,* 162 Cal. App. 2d 710, which are decisions of the Appellate Courts of the State of California in earlier proceedings in the instant case, establishing the law of this case and which opinions are necessary for a complete review of the proceedings.

II.

STATEMENT DISCLOSING BASIS OF JURISDICTION.

A. Jurisdiction is invoked under 28 U.S. Code, Section 1257 (3).

B. The judgment of the Supreme Court of the State of California was entered on the 9th day of

June, 1959. The time within which to file this petition for writ of certiorari was extended to and including the 7th day of October, 1959, by an order signed by the Honorable Hugo L. Black, Associate Justice of the Supreme Court of the United States on the 8th day of September, 1959, upon application of petitioner's counsel.

C. The petitioner has asserted reliance upon the 14th amendment to the United States Constitution in attempting to enforce his rights to interview prior to trial and produce as a witness if he so desires an alleged informer-participant. In the petition for writ of mandate filed in the District Court of Appeal of the State of California and in the petition for hearing by the Supreme Court of the State of California, petitioner has asserted reliance upon the 14th Amendment to the United States Constitution guaranteeing due process of law. While the petition for writ of mandate was denied without opinion and the petition for hearing by the Supreme Court was denied without opinion, this decision of the Supreme Court of the State of California constitutes a holding that the petitioner has been afforded due process of law as required by the 14th Amendment to the Constitution of the United States.

D. The conclusion of the California Court that the petitioner has been afforded the Constitutional guarantees of due process of law, presents for determination a substantial question relating to the extent of the protection afforded by the 14th Amendment and what is necessary to satisfy the requirements of due

process of law in cases in which the prosecution employs an informer-participant. The test apparently established by the Supreme Court of California, and the application thereof in the instant case, is at variance with principles recently announced by this Court.

The following cases are believed to sustain the jurisdiction of this Court:

Rescue Army v. Municipal Court, 331 U.S. 549;

Madruga v. Superior Court, 346 U.S. 556;

Michigan Central R. Co. v. Mix, et al., 278 U.S. 492.

III.

THE QUESTION PRESENTED.

The question which is presented by this petition:

Is due process of law satisfied if there has been formal compliance with the rule requiring disclosure of the name and whereabouts of an informer-participant, but through delaying tactics on the part of the prosecution or otherwise the purpose of the rule is thwarted?

IV.

THE CONSTITUTIONAL PROVISION INVOLVED.

The constitutional provision here involved is Section 1 of Amendment 14 to the United States Constitution which provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

V.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioner Nathaniel Castiel is a defendant in a criminal action presently pending before the respondent Superior Court and bearing therein number 52,336. The indictment in said action charges the petitioner with one count of violating Section 182 of the Penal Code of the State of California (conspiracy); 2 counts of violating Section 11,500 of the Health and Safety Code of the State of California (transporting narcotics); and 2 counts of violating Section 11,500 of the Health and Safety Code of the State of California (sale of narcotics).

On the 14th of September, 1956, following a trial by jury, the defendant was found guilty of all charges contained in the indictment. Thereafter that conviction was reversed upon the ground that a prosecution witness was permitted on cross-examination to withhold the name of an alleged informer-participant. This decision appears in *People v. Castiel,* 153 Cal. App. 2d 653, which is appended hereto.

Upon return of the case to respondent Superior Court, and prior to a retrial, the petitioner moved the

respondent Superior Court for an order compelling the prosecution to reveal, prior to trial, the name and whereabouts of the alleged informer-participant. At the time this motion was made the alleged informer-participant was, unknown to the defendant or his counsel, incarcerated in the San Francisco County Jail and available for interview, and production.

This motion of the petitioner was denied following which a petition for a writ of mandate was taken to the District Court of Appeal of the State of California, First Appellate District, which writ was granted, and required the Superior Court to order the District Attorney to reveal the name and whereabouts of the informer. The opinion in said case appears in *Castiel v. Superior Court,* 162 Cal. App. 2d 710, which is appended hereto.

Following the decision above mentioned, and although no formal writ of mandate was issued by the Court, it was stipulated by the District Attorney and petitioner's counsel that the decision entitled the petitioner to the name and present whereabouts of the alleged informer-participant. The respondent Superior Court thereupon ordered the District Attorney to provide that information to the petitioner. The District Attorney of the City and County of San Francisco, provided the name of the informer, his last known address and stated that although he had no knowledge of the present whereabouts of the informer, at the time the original motion to produce had been made, the informer was in the custody of the Sheriff of the City and County of San Francisco.

Petitioner thereupon immediately requested that the District Attorney be compelled to provide petitioner with the "present whereabouts" of the alleged informer-participant, relying upon the 14th Amendment and upon *Castiel v. Superior Court,* supra. This motion was denied.

Thereupon petitioner hired a private investigator licensed by the State of California to locate the alleged informer-participant. Thereafter, said investigator testified before the respondent Superior Court that he was unable to locate the alleged informer-participant and that he was unknown at the address provided by the District Attorney. He further testified that all reasonable efforts had been made to locate the informer with no success. The respondent Superior Court then ordered the District Attorney to provide petitioner with any other addresses he might have of the alleged informer. A second address was given to petitioner, the private investigator was again employed and the result was the same, the informer was unknown at the address.

Petitioner then moved the respondent Court for an order directing the District Attorney to provide the petitioner with the present whereabouts of the informer or to dismiss the action upon the grounds that failure to provide this information was contrary to the decision in the case of *Castiel v. Superior Court,* supra, and constituted a denial of due process of law. This motion was denied.

Over the objection of the petitioner the case was then set for trial. Petitioner then sought a writ of

prohibition from the District Court of Appeal of the State of California, First Appellate District to prohibit the trial of the action until the present whereabouts of the alleged informer-participant was revealed. This petition was summarily denied without opinion and a petition for hearing in the Supreme Court of the State of California was also denied without opinion.

Thereafter a petition for an alternative writ of mandate was filed in the District Court of Appeal, First Appellate District, Division Two, praying for the issuance of a writ of mandate directed to the respondent Superior Court, ordering the dismissal of the case against the petitioner; upon the ground that the failure to provide the information requested constituted a denial of due process of law. On the 14th of May, 1959, this petition was summarily denied without opinion. Thereafter a petition for hearing by the Supreme Court of the State of California was filed which petition was, on the 9th day of June, 1959, denied without opinion. It is of this decision that the petitioner requests review by this petition for writ of certiorari.

VI.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

A. The decision in the State Court permits evasion of the principle of due process of law which requires that a defendant in a criminal action be permitted to interview and produce as a witness if he so desires

an informer-participant. While the Court requires formal compliance with the rule of disclosure the purpose of the rule is defeated if the prosecuting authorities are permitted by delaying tactics to eliminate the value of the information to the defendant. This decision is in conflict with the principles enunciated by this Honorable Court in the case of *Roviaro v. United States*, 353 U.S. 53.

B. This Honorable Court should establish what procedural safeguards are necessary to guarantee to a defendant in a criminal action in a State Court due process of law in cases in which the prosecution has employed an informer-participant.

C. Argument.

1. *Summary of Argument.*

a. A defendant in a criminal action in which the prosecution has employed an informer-participant is as a matter of due process of law, entitled to the name and whereabouts of that informant in order that he may be interviewed prior to the time of trial and produced as a witness by the defense at the time of trial.

b. The law of this case establishes that the petitioner will be denied due process of law unless he is enabled to interview the informer-participant prior to the time of trial and produce said informer-participant as a witness if he so desires.

c. A mere apparent compliance with the requirements of due process is not sufficient if the defendant is actually denied the substantial guarantee of a fair trial.

d. While there has been apparent compliance with the requirements of due process, the prosecution has, by its delaying tactics effectively denied to the petitioner the guarantee of a fair trial.

2. *A defendant in a criminal action in which the prosecution has employed an informer-participant is as a matter of due process of law entitled to the name and whereabouts of that informant in order that he may be interviewed prior to the time of trial and produced as a witness by the defense at the time of trial.*

The above stated principle of law has, since this Honorable Court's decision in *Roviaro v. United States*, 353 U.S. 53, become a part of the fabric of American Justice. It is a principle which has been recognized and accepted not only by the Federal Courts but by the Courts of the State of California. See generally: *Gillmore v. United States*, 256 F. 2d 565; *United States v. One 1957 Ford Ranchero Pick-up Truck*, 265 F. 2d 21; *People v. Castiel*, 153 Cal. App. 2d 653; *People v. McShann*, 50 Cal. 2d 802.

The rule has been concisely stated that the defendant is entitled to the name of the informer "where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of the cause, . . ." *Roviaro v. United States*, supra.

3. *The law of this case established that the petitioner will be denied due process of law unless he is enabled to interview the informer-participant prior*

to the time of trial and produce said informer-participant as a witness if he so desires.

Following the first trial of this petitioner upon the charges here involved, and upon appeal the District Court of Appeal of the State of California stated:

> "The defendant is entitled as a matter of due process of law to be allowed to interview and produce any witness who might give evidence favorable to his defense, . . ."
>
> *People v. Castiel,* 153 Cal. App. 2d 653, 657.

The Court further stated:

> "It is the deprival of the defendants of the opportunity of producing evidence which might result in their exoneration which constitutes the error in this case, . . ."
>
> *People v. Castiel,* supra 659.

Subsequently when your petitioner approached the Appellate Court of the State of California for a writ of mandate to compel the prosecution to disclose the name of the informer, that Court stated:

> "Herein it has become the law of the case by our previous decision that the disclosure of this informer's identity is material and substantial to an adequate defense. Under the circumstances of this case, and we need not and do not go beyond the circumstances of the precise case before us, with Petitioner's right to the disclosure of the informer's identity established by our earlier decision as a matter of law, we would stultify ourselves and make a mockery of Petitioner's judicially established right by holding that he is

not now entitled to the information that he seeks in order to adequately prepare his defense."

Castiel v. Superior Court, 162 Cal. App. 2d 710, 711.

In each of the above cited cases the Supreme Court of the State of California denied a hearing and thus it has been judicially determined as the law of this case that the petitioner would be denied due process of law unless he is afforded the opportunity to interview the informer-participant prior to trial and produce him as a witness if he so desires.

4. *A mere apparent compliance with the requirements of due process is not sufficient if the defendant is actually denied the substantial guarantee of a fair trial.*

Due process of law is not a rigid concept which is satisfied by mere formal compliance with certain procedural rules. It is a guarantee to every defendant in a criminal action that he shall receive a fair trial and have the opportunity to adequately prepare and present his defense. This principle has been repeatedly recognized by the Courts of the United States.

In *Avery v. Alabama,* 308 U.S. 44, it was held that the mere formal appointment of counsel without allowing an opportunity for him to confer, to consult with the defendant and prepare his defense, may constitute a violation of the constitutional guarantee of assistance by counsel.

In *Foster v. Illinois,* 332 U.S. 134, it was held that due process which the 14th Amendment to the Con-

stitution exacts from the State is a conception of fundamental justice. It is not satisfied with mere formal procedural correctness.

In *Nebbia v. New York*, 291 U.S. 502, it was held that the procedural means employed must have a real and substantial relation to the object sought to be obtained or there has been a denial of due process.

In *Crooker v. California*, 357 U.S. 433, it was held that what due process requires in one situation may not be required in another because the least change in circumstances may provide or eliminate fundamental fairness.

Thus in attempting to evaluate whether or not a given defendant has received the fair trial to which he is entitled, the Courts should not be satisfied if there has been mere formal compliance with some arbitrary rule but should look behind the formality to see if there has been afforded to the defendant the basic protections to which he is entitled.

5. *While there has been apparent compliance with the requirements of due process, the prosecution has, by its delaying tactics, effectively denied to the defendant the guarantees of a fair trial.*

Following the original conviction in this case there was a reversal upon the sole ground that the defendant had been denied a fair trial because he was denied the opportunity to produce as a witness the alleged informer-participant. *People v. Castiel*, supra. Thereafter at a time when this informer-participant was, unbeknown to the defense, in the custody of the

Sheriff of the City and County of San Francisco, and available for interview and production as a witness, the defense made a motion for the revelation of the name and whereabouts of that alleged informer-participant. This motion was denied and it became necessary for the petitioner to secure a writ of mandate from the Appellate Courts of the State of California to compel the revelation of this information. Following the subsequent decision of the Appellate Courts of California in *Castiel v. Superior Court*, supra, this information was finally revealed to the defendant, but as has been described above it had become valueless because the alleged informer-participant was no longer available and could not be found. This result directly followed from the delaying tactics of the prosecution.

That it was the intent of the prosecution to delay for the purpose of hampering the preparation of the defense has been recognized by the Appellate Court of the State of California. In *Castiel v. Superior Court*, 162 Cal. App. 2d 710, 711, in discussing the actions of the prosecution, the Court stated:

> "Theirs is a delaying action only, designed to conceal from Petitioner the information to which he is admittedly entitled to the last possible moment *and thus to handicap him as much as possible in the preparation of his defense.*" (Emphasis added.)

Delaying tactics and suppression of evidence by the prosecution have been condemned by this Court as constituting a denial of due process to a defendant

in a criminal action. See generally *Mooney v. Holohan*, 294 U.S. 103.

Thus unless some action is taken by this Honorable Court, the recognized delaying tactics of the prosecution and their judicially recognized attempts to hamper the preparation of an adequate defense will succeed and result in the petitioner being tried without a reasonable opportunity to prepare his defense.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of the State of California, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment therein of said Supreme Court of California be reversed by this Court, and for such other and further relief as to this Court may seem proper in the premises.

Dated, October 7, 1959.

NATHANIEL CASTIEL,
Petitioner.
By HARRY P. GLASSMAN,
Counsel for Petitioner.

(Appendix Follows.)

People v. Castiel, 153 Cal. App. 2d 653.

The appellants were charged jointly in an indictment in five counts, one of conspiracy to violate Section 11,500, Health and Safety Code, two counts charging separate sales of heroin and two counts charging transportation of heroin. Appellant Castiel was convicted on all five counts and appellant Benjamin of conspiracy and on one count each of sale and transportation, the other two counts having been dismissed as to her.

The prosecution's evidence showed that an informer in the presence of three narcotics officers on March 2, 1956, talked on the telephone to a man called "Nate," asked for a "couple of spoons" and was told to "go to the coffee shop Sears-Roebuck." The telephone number called was that of the telephone located in the home of appellant Benjamin and her husband. One of the officers "listened in" on the conversation on an extension telephone. The informer was searched and given $50.00 in marked currency. The three officers went with the informer to Sears-Roebuck's store. One officer entered the coffee shop with the informer. Appellant Castiel was seen to drive into the parking lot, leave his automobile and enter the coffee shop. One of the officers testified to seeing a transfer of currency from the informer to Castiel and a small white package from Castiel to the informer. Another saw a meeting of the hands. After Castiel left the informer gave one of the officers two

small paper wrapped packages which were found to contain heroin.

Later the same day a second telephone call was made to the same number. A woman answered the informer who said she was "Flo," and when asked for "a couple of more spoons" directed the informer to go to Turk and Baker Streets. When asked: "Will you bring it?" she replied: "No, I'll send Nate." The informer was again searched and given another $50 and proceeded with the officers to the rendezvous. The informer stood on the corner, within sight of the officers. Castiel drove up in an Oldsmobile identified as belonging to the husband of appellant Benjamin. Informer entered the Oldsmobile and remained therein for a short time. When the Oldsmobile had driven away one of the officers received two "bindles" of heroin from the informer. Another officer followed the Oldsmobile to appellant Benjamin's residence, where Castiel parked it and entered the house.

Both appellants took the stand and flatly denied the testimony of the officers. It will be observed that the evidence against Castiel is quite direct and that against Benjamin quite weak, depending on inferences from circumstantial evidence.

The most important question in the case arises from the refusal of the agents on cross-examination to reveal the name of the informer, claiming the information privileged under Section 1881, Code of Civil Procedure. The trial court sustained objections on this ground. It is appellant's claim that where an informer, as here, is an active participant the

privilege must give way to the constitutional right of the defendants to produce him as a witness in their defense.

We may well take as a starting point in the discussion of this question the language of the Missouri Supreme Court in *State v. Tippell,* 317 Mo. 319 [296 S.W. 132, 135] (quoted with approval by our own Supreme Court in *Powell v. Superior Court,* 48 Cal. 2d 704, 709 [312 P. 2d 698]): "That it was desired that the state's evidence remain undisclosed, partakes of the nature of a game, rather than judicial procedure. The state in its might and power ought to be and is too jealous of according a defendant a fair and impartial trial to hinder him in intelligently preparing his defense and in availing himself of all competent material and relevant evidence that tends to throw light on the subject-matter on trial." Our Supreme Court in the case in which this language was quoted declared it to be ". . . the policy of this state that the goal of criminal prosecutions is not to secure a conviction in every case by any expedient means, however odious, but rather, only through establishing the truth upon a public trial fair to defendant and the state alike." *(Powell v. Superior Court,* supra, 48 Cal. 2d 704, 707.)

At every essential step tending to fix guilt upon these appellants the testimony shows that the undisclosed informer was a principal actor and, if called to the stand, would be a material and important witness. He placed the two telephone calls which were monitored by the officers, and it was he who is alleged

in their testimony to have spoken over the telephone to each of the appellants. It is he in both cases who is alleged in the testimony to have purchased and received narcotics from the appellant Castiel. The appellants in this case both took the stand and denied the alleged telephone conversations and the alleged sales of narcotics. If the undisclosed informer were not an informer but a stranger to them and the officers had overheard and testified concerning the identical telephone conversations no one can doubt that the officers on cross-examination could be asked the identity of the person who had made the telephone calls and to disclose it if known to them. If the officers had observed the transfer of a package from a defendant to another person not an informer under the same circumstances as here and testified to that fact no one can doubt that on cross-examination the officers would be required to disclose the identity of the person, if known to them, to whom, according to their testimony, the officers had seen the package transferred. The possible importance of this person's identity to the defense is just as great whether he happens to be a government informer or not. In either event, if the defendant had the opportunity to interview him and call him as a witness, he might contradict the testimony of the officers completely or in part. He might deny that he was present at all, or participated in any of the transactions. He might corroborate the officers as to the telephone calls and the purchases of narcotics but testify that the persons to whom he talked and from whom he made the purchases were persons other than the appellants. It

would be intolerable if the government could convict its citizens of crime and thereby deprive them of their liberty and civil rights while denying them the opportunity to produce a witness or witnesses to the alleged crime, whose identity is known to the witnesses who testify against him. The defendant is entitled as a matter of due process of law to be allowed to interview and produce any witness who might give evidence favorable to his defense, and when a witness who testifies to the commission of a crime testifies that another person or other persons were also present, and particularly where such other person or persons according to the testimony were active participants, the right of the defendant to the disclosure of the identity of such person or persons on cross-examination seems too clear for successful contradiction. If this was a case without precedents logic and the basic constitutional guaranty of due process would compel this conclusion, but it is not a case without precedents.

The cases generally hold that where in the trial of a criminal case the basic right of a defendant to produce evidence which might exonerate him comes into conflict with a privilege of the government to withhold such evidence from disclosure the government's privilege must in general give way to the basic right of the defendant. (*Roviaro v. United States*, 353 U.S. 53 [77 S. Ct. 623, 1 L. Ed. 2d 639]; *People v. Lawrence*, 149 Cal. App. 2d 435 [308 P. 2d 821]; *Portomene v. United States*, 221 F. 2d 582; *United States v. Conforti*, 200 F. 2d 365; *Sorrentino v. United States*, 163 F. 2d 627; *Wilson v. United States*, 59 F.

2d 390; *United States v. Blich*, 45 F. 2d 627; *United States v. Keown*, 19 F. Supp. 639; *United States v. Coplon*, 185 F. 2d 629; *United States v. Andolschek*, 142 F. 2d 503; *People v. Ramistella*, 306 N.Y. 379 [118 N.E. 2d 566]; *Parson v. State*, 251 Ala. 467 [38 So. 2d 209]; *Centoamore v. State*, 105 Neb. 452 [181 N.W. 182]; *People v. Davis*, 52 Mich. 569 [18 N.W. 362]; *Crosby v. State*, 90 Ga. App. 63 [82 S.E. 2d 38]; *Smith v. State*, 169 Tenn. 633 [90 S.W. 2d 523]; *Mapp v. State*, 148 Miss. 739 [114 So. 825]; *Hill v. State*, 151 Miss. 518 [118 So. 539].)

Many, but not all, of these cases deal with the informer privilege, but all deal with some asserted governmental privilege which in each case was held to be subordinate to the basic right of the defendant to produce evidence which might prove important or vital to his defense.

The *Roviaro* case, supra, 353 U.S. 53 [77 S. Ct. 623, 1 L. Ed. 2d 639] and the *Lawrence* case, supra, 149 Cal. App. 2d 435 (decided by this court without benefit of the reasoning in, or knowledge of, the *Roviaro* decision, since the *Roviaro* opinion was filed in Washington on the day before the filing of the *Lawrence* opinion here) both dealt with the precise question here involved, the right of the defendant to have the identity of the participant informer disclosed on cross-examination of the officer-witness who testified about the transaction in which the informer took an active part. In both it was concluded that in such circumstances the government's privilege must yield to the defendants' right to be informed of the identity

of the informer-participant. The attorney general seeks to distinguish these cases on the ground that here, as to the two telephone calls and one sale at least, there was precise eyewitness testimony of prosecution witnesses sufficient to fix appellants' guilt. The cases in principle cannot be logically distinguished on this ground. In the *Roviaro* case there was in fact much eyewitness testimony. The basic right of the defendants, however, cannot depend on this factor. No one knows what the undisclosed informer, if produced, might testify. He might contradict or persuasively explain away the prosecution's evidence. It is the deprival of the defendants of the opportunity of producing evidence which might result in their exoneration which constitutes the error in this case, and we cannot assume because the prosecution evidence may seem strong that the undisclosed evidence might not prove sufficient to overcome it in the minds of the jurors. To do so is to reason that in no case can a defendant suffer prejudice from the suppression of evidence which may be favorable to him if the prosecution has produced what seems to be a strong eyewitness case of the defendant's guilt.

The suggestion that appellants must have known the informer's identity because they dealt and talked with him finds its complete answer in the fact that they categorically denied on the witness stand that they did either.

Appellant Benjamin moved to set aside the indictment on the ground that this defendant had been indicted without reasonable or probable cause. The

officer who listened to the second telephone conversation on an extension telephone testified that the female voice which he heard "appeared to be the voice of Floreen Benjamin." The evidence to support an indictment need not be sufficient to support a conviction. "Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused." (*Bompensiero v. Superior Court*, 44 Cal. 2d 178, 183 [281 P. 2d 250].) The evidence was sufficient to meet this test.

The court reporter was permitted to testify to a conversation which he overheard between appellant Castiel and his attorney during a recess. The reporter testified that he was in plain sight and no question of surreptitious eavesdropping is presented. The attorney-client privilege does not prevent a third person openly present at and who overhears a conversation between attorney and client from testifying. (*City and County of San Francisco v. Superior Court*, 37 Cal. 2d 227, 236 [231 P. 2d 26, 25 A.L.R. 2d 1418]; *Ver Bryck v. Luby*, 67 Cal. App. 2d 842, 844 [155 P. 2d 706]; 8 Wigmore on Evidence, 3d Ed. 2326 pp. 629-630.)

Nineteen days elapsed after March 2, 1956, before the arrest of the appellants on March 21. On cross-examination of one of the officers this delay in making the arrests was emphasized. In rebuttal the officer was permitted to testify that the reason for the delay was that they had information that appellants were expected to receive more narcotics. It was within

the discretion of the trial court to permit the witness to rebut any adverse inference which the jury might draw from the delay in arrest so emphasized on cross-examination. *(People v. LaMacchia,* 41 Cal. 2d 738, 749 [264 P. 2d 15]; *People v. Corey,* 8 Cal. App. 720, 725 [97 P. 907].)

Appellant Benjamin not only denied that she had any connection with the sale or transportation of narcotics but she further testified that her husband's Oldsmobile, alleged to have been driven by Castiel in the second delivery of narcotics on March 2, was in a garage undergoing repairs from some time in February to March 15. She was asked:

"Q. Well, then, Mrs. Benjamin, isn't it a fact that when the State of California took your car by forfeiture, you didn't even protest?

* * * * * * * *

Q. You didn't defend it, did you?

A. I don't have any money to defend it."

The question was objected to on the expressed grounds: "The person may not defend it, because it may not be worth the amount that it costs to defend it and, which was the exact case here."

The objection did not raise any of the grounds now urged on appeal and for that reason we need not notice them. *(People v. Agajanian,* 97 Cal. App. 2d 399, 405 [318 P. 2d 114]; *People v. Sellas,* 114 Cal. App. 367, 378 [300 P. 150].)

Appellant Castiel was similarly asked if it was not true that in the proceeding to forfeit his automobile

he refused to testify on the ground that it might incriminate him. The court limited the reply to the purpose of impeachment. Castiel's answer was that he refused to answer on advice of his counsel. "Personally, I wanted to testify." The evidence, limited to impeachment only, was proper. (*People v. Kynette*, 15 Cal. 2d 731, 749-750 [104 P. 2d 794].)

Claimed acts of misconduct of the district attorney and of the court need not be noticed since we are entitled to assume that they will not recur.

In the event of a retrial it seems clear that on the evidence produced on this trial defendants could not properly be convicted of both transportation and sale of the same narcotics, since the only transportation proved were necessarily incident to the sales. (*People v. Roberts*, 40 Cal. 2d 483, 491 [254 P. 2d 501].)

For the error first above noted the judgment and order denying a new trial is reversed as to both appellants.

Kaufman, P. J., and Draper, J., concurred.

A petition for a rehearing was denied October 10, 1957, and respondent's petition for a hearing by the Supreme Court was denied November 5, 1957.

Castiel v. Superior Court, 162 Cal. App. 2d 710.

Petitioner is the defendant in the case in which a previous judgment of conviction was reversed by this court in *People v. Castiel*, 153 Cal. App. 2d 653 [315 P. 2d 79]. The conviction in that case was reversed on the sole ground that the defendant (petitioner herein) is entitled to the disclosure of the name of the informer who had been a participant in the crimes which petitioner was charged with committing. The Supreme Court denied a hearing in that appeal and our opinion has now become the law of the case, establishing that petitioner is entitled to the disclosure of the unidentified informer's name and cannot be legally convicted if that information is denied to him.

The case was set for a second trial. In advance of the trial the petitioner made a motion before the trial court that the court order the district attorney to disclose the name and present whereabouts of the informer. The court denied this motion and petitioner filed his petition for writ of mandate in this court.

It is conceded by counsel for the respondent that under our previous decision the identity of the informer must be disclosed at the time of trial if the petitioner is brought to trial again. Theirs is a delaying action only, designed to conceal from petitioner the information to which he is admittedly entitled to the last possible moment and thus to handicap him as much as possible in the preparation of his defense.

It is now well settled that in a proper case the disclosure of matters which are material and substantial to the preparation of an adequate defense may be

compelled in advance of the trial. *(Powell v. Superior Court,* 48 Cal. 2d 704 [312 P. 2d 698]; *Walker v. Superior Court,* 155 Cal. App. 2d 134 [317 P. 2d 130]; *Cordry v. Superior Court,* 161 Cal. App. 2d 267 [326 P. 2d 222].) Herein it has become the law of the case by our previous decision that the disclosure of this informer's identity is material and substantial to an adequate defense. Under the circumstances of this case, and we need not and do not go beyond the circumstances of the precise case before us, with petitioner's right to the disclosure of the informer's identity established by our earlier decision as a matter of law, we would stultify ourselves and make a mockery of petitioner's judicially established right by holding that he is not now entitled to the information that he seeks in order to adequately prepare his defense.

The writ of mandate will issue as prayed.

Kaufman, P. J., and Draper, J., concurred.

A petition for a rehearing was denied September 11, 1958, and the petition of respondent and the real party in interest for a hearing by the Supreme Court was denied October 10, 1958.

District Court of Appeal of the
State of California
In and for the First Appellate District

DIVISION TWO

No. 18,757

NATHANIEL CASTIEL,
Petitioner,

vs.

SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

By the Court:

The petition for a writ of mandate is denied.

Dated, May 14, 1959.

/s/ Kaufman, P. J.

In the Supreme Court of the State of California

In Bank

NATHANIEL CASTIEL,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

ORDER DENYING HEARING

After Judgment of the District Court of Appeal
First District, Division Two, Civil 18,757

Petition for hearing denied.

Dated, June 10, 1959.

/s/ Gibson, Chief Justice.